

B. WWC's petition for designation is deficient on its face for seeking designation in an area that does not correspond with the existing rural telephone company service areas.

In its petition for ETC designation, WWC has described a wireless service offering that is limited to the boundaries of the Pine Ridge Reservation, and has specifically requested "that the Commission designate Western Wireless' "service area," for purposes of its universal service offering targeted to the Pine Ridge Reservation, to be identical to the geographic area of the Reservation.²⁷ There are presently three incumbent rural telephone companies providing universal service on the Reservation that have already been designated ETCs, including GWTC, Fort Randall, and Great Plains Communications. These three rural telephone companies also serve areas located outside the Reservation boundaries and consistent with the provisions of 47 U.S.C. § 214(e)(5), their designated service areas, for purposes of the federal universal service support mechanisms, coincide with their existing "study areas." GWTC and Fort Randall, which are SDITC member companies, each received its ETC designation from the Commission on December 17, 1997, and the SDPUC in issuing the ETC designation orders specifically designated the companies' "current study areas" as their service areas. ("Appendix B" attached).²⁸

Section 214(e)(1) of the Communications Act, which sets forth the service obligations imposed on ETCs, requires that a common carrier designated as an ETC shall offer and advertise the services that are supported by federal universal service support mechanisms "throughout the

²⁷ WWC Petition, pp. 7, 8.

²⁸ Appendix B includes certified copies of the SDPUC's ETC Designation Orders relating to GWTC and Fort Randall Telephone issued in SDPUC Dockets TC97-069 and TC97-074, respectively; *See In the Matter of the Filing by Golden West Telecommunications Cooperative, Inc. for Designation as an Eligible Telecommunications Carrier*, Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order, TC97-069, p. 5, Conclusion of Law IX, and *In the Matter of the Filing by Fort Randall Telephone Company for Designation as an Eligible Telecommunications Carrier*, Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order, TC97-074, p. 5, Conclusion of Law IX.

service area for which the designation is received.”²⁹ The Act, under Section 214(e)(5), defines service area for purposes of the ETC service obligations as follows:

The term “service area” means a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, “service area” means such company’s “study area” unless and until the Commission and the State’s, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.³⁰

The petition for designation filed by WWC, which is limited to seeking ETC status on the Pine Ridge Reservation, necessarily raises a question as to whether WWC as a competitive ETC can be assigned its own unique service area for purposes of the federal ETC provisions or whether its’ service area for universal service support purposes must coincide with the service areas of the rural telephone companies that have already received ETC status. SDITC believes that WWC’s petition for designation is deficient on its face because it is tied to the incorrect assumption that this Commission under the federal ETC provisions may grant WWC a different service area. Under the current law, the Commission does not have such discretion.

The Commission has already addressed the issue of rural service areas for purposes of applying the federal ETC provisions and has specifically held that a competitive ETC in order to meet the ETC service obligations must offer the required telecommunications services throughout the rural telephone company’s established service area. The Federal-State Joint Board on Universal Service (“Joint Board”) in its first decision on universal service issued after the 1996 Telecommunications Act, recommended retaining the study areas of rural telephone companies as the rural service areas for purposes of the ETC provisions.³¹ This recommendation was based on a finding that it would be consistent with section 214(e)(5) and the policy objectives underlying 47

²⁹ See also 47 C.F.R. § 54.201(d).

³⁰ See also 47 C.F.R. § 54.207(a) and (b).

³¹ See *Federal-State Joint Board on Universal Service*, CC Docket 96-45, Recommended Decision, 12 FCC Rcd 87 at ¶ 179-180 (1996).

U.S.C. § 254. The Joint Board specifically noted concern with the potential for “cream skimming” by competitors.³² If service areas were the same as study areas, the Joint Board recognized that competitors would then have to offer their services throughout the rural telephone company’s study area. The Commission, in its subsequent first Report and Order on Universal Service, adopted the Joint Board’s service area recommendation.³³ The Commission noted in agreement with the Joint Board, that “if competitors, as a condition of eligibility, must provide services throughout a rural telephone company’s study area, the competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the ILEC’s [incumbent local exchange carrier’s] ability to provide service throughout the area.”³⁴ Also, it was noted that this decision would be consistent with the Commission’s decision “to use rural ILEC’s embedded costs to determine, at least initially, that company’s costs of providing universal service because rural telephone companies currently average such costs at the study area level.”³⁵

This position of the Commission, that competitive ETCs in rural service areas must offer their services throughout the existing rural telephone company service areas as a condition of eligibility for federal universal service support, has been reconfirmed in subsequent Commission proceedings. The Commission restated its agreement with the Joint Board’s recommended decision pertaining to rural service areas in a Memorandum Opinion and Order issued in September of 1999, in response to certain service area proposals of the Washington Utilities and Transportation Commission.³⁶ In addition, very recently, the Commission issued a Public Notice

³² Recommended Decision, 12 FCC Rcd at ¶ 172.

³³ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, FCC97-157, released May 8, 1997, ¶ 189.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *In the Matter of Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support*, CC Docket 96-45, Memorandum Opinion and Order, DC 99-1844, released September 9, 1999, ¶ 11.

on a filing by the Minnesota Public Utilities Commission that is relevant. The Minnesota filing and the related Public Notice specifically recognize the earlier established requirement that competing carriers seeking ETC designation must offer their proposed services throughout the rural telephone company's existing service area, which unless otherwise changed is the rural company's "study area."³⁷

The SDPUC, in addressing requests submitted by competitive ETCs for ETC designation, has adopted the same service area requirement. In Docket TC98-111, In the Matter of the Filing by Dakota Telecom, Inc. for Designation as an Eligible Telecommunications Carrier, the SDPUC determined that "when designating a second ETC in a rural telephone company's service area, the second ETC must serve the entire service area of the rural telephone company."³⁸ In making such determination, the SDPUC specifically noted that its "position is consistent with the Federal-State Joint Board on Universal Service's (Joint Board) and the FCC's interpretations of section 214(e)."³⁹ The SDPUC further concluded "that it would not be in the public interest to allow a competitive telephone company to be designated as a second ETC for a lesser service area than that served by a rural telephone company, [that] [d]esignating a lesser service area for a competitive local exchange company may serve to undercut the incumbent rural telephone company's ability to provide services throughout its service area."⁴⁰

Based on these determinations by this Commission and the SDPUC establishing that competitive ETCs must offer their services throughout the existing rural telephone company

³⁷ *In the Matter of the Minnesota Public Utilities Commission Petition for Agreement to Redefine the Service Area of Frontier Communications of Minnesota, Inc.*, CC Docket 96-45, DA 00-2661, released November 29, 2000.

³⁸ Order Denying Request for ETC Designation; Notice of Entry of Order, TC98-111, dated December 11, 1998, p. 2, Finding of Fact 7.

³⁹ Id., the SDPUC's determination is also buttressed by South Dakota statute relating to the certification of competitive local exchange carriers. Under SDCL § 49-3-73, the South Dakota legislature took action pursuant 47 U.S.C. § 253(f) to declare that competitors seeking entry into rural service area must, as a condition to even receiving a certificate of authority to provide competitive local exchange services, show that they will offer their services throughout the affected rural service area (absent obtaining a specific waiver from the SDPUC).

⁴⁰ Id. pp. 2, 3, Finding of Fact 9.

service area, it is clear that WWC's petition must be dismissed. As of this time, the existing service areas of the rural telephone companies that serve the Pine Ridge Reservation are their "study areas". As earlier mentioned, these study areas include areas outside the Reservation boundaries. Accordingly, unless and until the study areas or existing rural service areas are changed, WWC cannot properly pursue ETC designation based on a reservation-only universal service offering.

The Commission has by administrative rule established a specific process for dealing with requests to change existing service areas. WWC without first following this process and obtaining a change to the existing rural telephone company service areas cannot seek designation limited to the Pine Ridge Reservation. The process for changing service areas is found in 47 C.F.R. § 54.207 and is guided by the provisions in federal statute (47 U.S.C. § 214(e)(5)), which mandate both federal and state participation in decisions to change rural service areas. In part, Section 54.207 of the Commission's rules permits the Commission, on its own motion, to initiate a proceeding to consider a definition of a service area served by a rural telephone company that is different from that company's study area. If, however, the Commission takes such action it is also obligated to seek agreement from the state commission on the proposed service area change by submitting a petition according to the state commission's procedures. Under Section 54.201(d)(2), specifically, any new definition of service area proposed by the FCC "shall not take effect until both the state commission and the Commission [FCC] agree upon the definition of a rural service area, in accordance with . . . section 214(e)(5) of the Act."

WWC, under its petition for designation, appears to be requesting a change to the existing rural service areas, yet no proceeding under this Commission's established process for changing service areas has either occurred or been initiated. WWC apparently believes that this Commission has the authority to make a service area change based on its instant petition and in

this particular proceeding. SDITC disagrees and would strongly object to any attempt in this proceeding to alter the existing service area definitions. The Commission has a specific process in place for making service area changes, a process which calls for both federal and state involvement on rural service area changes.⁴¹

Contrary to what WWC may believe, the Commission may not in this case simply grant ETC designation limited to the Reservation and subsequently address the related service area issues. Until the relevant rural service areas are actually validly changed through the established process, the WWC petition is premature and seeks a designation that this Commission cannot legally give. As of today, the existing rural service areas are defined as the rural telephone company study areas. The Commission by its own orders has stated that the rural telephone company service area is the pertinent area for purposes of determining whether a competitive carrier is meeting the ETC service obligations imposed by Section 214(e)(1). Thus, from a legal standpoint, the petition seeking designation must meet the ETC service obligations and request designation throughout the affected rural service area(s). WWC's petition asks this Commission to grant ETC designation based on the hypothetical -- on an assumption that a proceeding to change the rural service areas may be initiated pursuant to 47 C.F.R. § 54.207 and that such proceeding may bring changes that would accommodate WWC's request for a service area limited to the Pine Ridge Reservation.

The petition for designation submitted by WWC must be judged on the law and facts as they sit today, not based on pure speculation that the service area may at sometime in the future be changed. To do otherwise, would circumvent the law and be grossly unfair to the other parties, forcing them to prematurely expend resources in litigating issues that are not ripe for

⁴¹ SDITC would further point to the Commission's decision in CC Docket No. 96-45, *In the Matter of the Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, Memorandum Opinion and Order*, DA 00-2896, ¶ 23, where the Commission granted ETC designation consistent with the established service areas.

determination. Based on its earlier decisions finding that competitive ETCs must provide their universal service offering throughout the existing rural service areas, this Commission has no choice but to dismiss the WWC filing.

C. Even if, arguendo, WWC could request an ETC designation limited to the Pine Ridge Reservation, it has failed to show that it is meeting the ETC service obligations by offering all of the required telecommunications services throughout such area.

WWC claims on page 6 of its petition for designation that it “currently provides on the Pine Ridge Reservation all the services and functionalities supported by the federal universal service program as required by the FCC,” implying that it has met the requirement stated in 47 U.S.C. § 214(e)(1) for an offering of the required telecommunications services throughout the requested service area. Yet, later in the petition, WWC admits that it is still “in the process of deploying additional cell sites and channels on the Reservation.”⁴² In indicating that it has met the ETC service obligations, WWC has conveniently chosen to ignore the language found in Section 214(e)(1) that more precisely requires an offering of all of the ETC services “throughout the service area for which the designation is received . . .”

SDITC disputes WWC’s claim that it meets the ETC service obligations as spelled out in 47 U.S.C. § 214(e)(1). Even if, arguendo, it is assumed that WWC could limit its universal service offering to the Pine Ridge Reservation (an area that is lesser than the current rural service areas or study areas), the petition indicates very clearly that WWC is not at this time offering its fixed wireless service throughout such area. WWC claims a “current” offering, but at the same time admits a need for more construction in order to increase its signal coverage. WWC, in fact, notes that it has only just recently filed with the Commission unserved area applications seeking

⁴² WWC Petition, p. 7.

approval to construct two more cell sites on the Pine Ridge Reservation. These referenced applications are currently still pending with the Commission.⁴³

In light of these facts, WWC cannot establish that it is offering its wireless local loop service throughout the entire Reservation and, consequently, it fails to meet the ETC service requirements. Section 214(e) requires ETCs to “offer” services supported by the federal support mechanisms. The exact phrase that appears in section 214(e) states that an ETC shall throughout the service area for which designation is received . . . offer the services that are supported by the federal universal service support mechanisms . . .” *Emphasis added*. This language requires an applicant for ETC designation to actually “offer” the services supported by the universal service mechanism, when ETC status is sought. WWC is seeking ETC designation based merely on a plan that it will at some undetermined future date be offering all of the required services throughout the Reservation area. Such facts, limited to vaguely defined plans or promises, are insufficient to warrant the requested designation. ETC status may not be granted to carriers based merely on some future intent to offer the services throughout the requested service area.⁴⁴

The Commission in a Declaratory Ruling issued in CC Docket No. 96-45, In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, FCC 00-248, released August 10, 2000, found that interpreting Section 214(e) to require a “provision of service throughout the service area prior to designation as an ETC [is] inconsistent with the Commission’s universal service policies and rules.” SDITC on September 11, 2000, filed a petition for reconsideration and clarification of the Declaratory Ruling and stands by the arguments contained in that petition relating to the proper interpretation of Section 214(e) of the Act. However, even

⁴³ WWC Petition, p. 7, Footnote 10.

⁴⁴ See *In the Matter of Federal-State Joint Board on Universal Service – Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-4, Petition for Reconsideration and Clarification of the South Dakota Independent Telephone Coalition, dated September 11, 2000.

despite the pending issues relating to the interpretation of Section 214(e), this Commission stated in its Declaratory Ruling that a new entrant must “make a reasonable demonstration to the state commission of its capability and commitment to provide universal service without the actual provision of the proposed service.”⁴⁵ The Commission specifically cautioned that this “must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation.”⁴⁶ *Emphasis added.*

The WWC petition for designation indicates that the company needs to construct additional cell sites before it will be positioned to offer its fixed wireless service on a wider scale within the Reservation. It also indicates that it has not yet even received Commission approval to construct the cell sites, and no timetable is provided by WWC as to when its additional construction will be completed and its service will be available to all areas within the Reservation. Under these facts, it would be unfair to conclude that WWC is currently offering the services throughout the service area or that it would be in a position to do so, with some immediacy, upon being designated an ETC. WWC has failed to show compliance with the ETC service obligations as contemplated by the Section 214(e) provisions.

D. WWC does not have a certificate of authority from the SDPUC authorizing it to legally provide its fixed wireless services.

WWC’s offering of service on the Reservation is described in WWC’s petition for designation as a “wireless local loop” service. It is made available to consumers through the use of WWC’s cellular network facilities and certain customer premise equipment including a “fixed

⁴⁵ Declaratory Ruling, FCC 00-248, p. 11, ¶ 24.

⁴⁶ Id.

wireless terminal” that would be installed at the residence or business location.⁴⁷ As has been clearly shown by comments provided to the Commission in WT Docket No. 00-239, In the Matter of the Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is subject to Regulation as Local Exchange Service, WWC’s described universal service offering is intended to serve as a substitute to the existing landline telephone services and the “fixed wireless terminal” to be used by consumers in accessing the wireless service is not designed to be used in a mobile fashion.

Because WWC is offering a “fixed” wireless service that is intended as a substitute to the existing landline local exchange services, the state preemption language set forth in 47 U.S.C. § 332(c)(3), which generally forbids state entry and rate regulation over CMRS providers, does not apply. The preemption provisions found in Section 332(c)(3) extend only to state regulation over “commercial mobile service” and “private mobile service.” To the extent that a CMRS provider offers fixed wireless services that are intended to compete with and to replace existing landline local exchange services, state utility commissions are not precluded from regulating the fixed wireless services consistent with their regulation applied to other local exchange services.

The law in South Dakota makes no distinction as to whether local exchange services are being offered by wire or wireless technology. Local exchange services provided by either means are to be regulated in a consistent manner. Specifically, the provisions of SDCL § 49-31-69 through 49-31-75 set forth the process for SDPUC certification of “telecommunications companies” which seek to provide local exchange services. SDCL § 49-31-69 provides that “no telecommunications company may begin the construction of a telecommunications facility intended to provide local exchange service, commence operating a telecommunications facility for

⁴⁷ WWC Petition, pp. 6, 7, and WWC’s Appendix D.

the purpose of providing local exchange service, or offer or otherwise provide local exchange service in this state prior to receiving a certificate of authority to provide the service from the Commission [SDPUC] . . .” “Local exchange service” is defined by SDCL 49-31-1(19) as “the access to and transmission of two-way switched telecommunications service within a local exchange area.” “Telecommunications services” which is defined by SDCL § 49-31-1(36) references specifically the transmission of communications by “wire, radio, lightwaves, electromagnetic means or other similar means.” *Emphasis added.*

WWC, in its provisioning of fixed wireless services for the purpose of providing the basic telephone services listed in 47 C.F.R. § 54.101(a), is clearly subject to the SDPUC local exchange certification provisions set forth in SDCL § 49-31-69 to 49-31-75. The federal law does not preempt the SDPUC from regulating the fixed wireless services at issue and the state statutes are not confined in their application to only landline service providers.

As of the date of these comments, however, WWC has not presented any application to the SDPUC for a certificate of authority to provide local exchanges services. Until this has occurred and WWC has received the requisite SDPUC certification, SDITC challenges the company’s ability to even legally offer its fixed wireless services in South Dakota. Absent legal authority from the State to offer such services, the WWC petition before this Commission should be viewed as improper. WWC’s unwillingness to comply with the state certification statutes should not be ignored in this process.

E. Designating an additional ETC in the affected rural service areas would not be in the “public interest” as is required by the provisions of Section 214(e)(2).

Both federal and state law require that, before more than one ETC may be designated within any service area served by a rural telephone company, a finding must be made that

designating an additional ETC in such area would be in the public interest.⁴⁸ These federal and state provisions are intended to recognize the different economies and costs faced by rural carriers in providing service and reflect Congress' and the South Dakota State Legislature's concern that designating more than one ETC in rural service areas, with the resulting sharing of any available universal service funding, may be counter productive to preserving and advancing universal service.

The language contained in both Sections 214(e)(2) and 214(e)(6) of the Federal Act pertaining to rural service areas specifically recognizes that designating more than one ETC in sparsely populated, high-cost rural areas may negatively impact the affordability and quality of service brought to rural customers. The plain words used noting that an additional ETC "may" be designated in rural service areas – as distinguished from "all other areas" where an additional carrier "shall be designated – indicate that the government policy favoring a designation of a competitive eligible carrier in "all other areas" does not apply to rural service areas. Congress specifically imposed an additional public interest criteria applicable to rural service areas. This reflects an understanding on the part of Congress that designating multiple ETCs in rural service areas may adversely impact rural consumers and establishes a presumption against designating more than one ETC.

WWC, as the petitioning party in this case, has the burden of proof to show not only that it has met the ETC service obligations, but to also establish that its requested designation would be in the public interest. Neither SDITC nor any other party has the burden to disprove assertions that it would be in the public interest to designate WWC as an ETC. WWC carries the burden, and meeting such burden requires more than simply proclaiming the benefits of competition.

⁴⁸ See 47 U.S.C. §§ 214(e)(2) and 214(e)(6), and also SDCL 49-31-78, which states in pertinent part that "the [C]ommission [SDPUC] may not in an area served by a rural telephone company designate more than one eligible telecommunications carrier absent a finding that the additional designation would be in the public interest."

WWC claims that its designation would be in the public interest, but provides little, if any actual data, to support such claims. For example, it is claimed in the petition that designating WWC as an additional ETC at Pine Ridge “will serve the public interest by greatly improving the telephone penetration rate.”⁴⁹ As support for this claim, it is stated that the “the existing local telephone service currently provided at Pine Ridge by the incumbent has yielded a telephone penetration rate of less than 50% on the Reservation.”⁵⁰ It is telling, however, that this referenced “data” is merely based on a “Resolution of the Oglala Sioux Tribal Council.”⁵¹ No information is provided as to how the 50% percent figure was arrived at (whether it is based on any actual study of telephone penetration.) WWC also claims that designating WWC as an ETC on the Reservation will “promote the rapid development of new technologies,” in the form of advanced WWC facilities and improved incumbent network facilities. Again, no supporting information is provided. WWC has not indicated what its advanced facilities will be or when its advanced service deployments might actually occur. With regard to these claims relating to advanced facilities and services, the information contained in WWC’s petition is contradicting. The technology that WWC is deploying on the Reservation, as described in the petition, is limited to cellular analog facilities and equipment. The offering described is not any sort of digital wireless service that would be capable of providing advanced voice and data capabilities. This being the case, there is good reason to question what WWC views as new or advanced technology or services? Cellular analog facilities and services have existed in other areas of South Dakota for many years. Characterizing such facilities and services as “new” or “advanced” would require quite a leap. Also, what is the support for WWC’s statement indicating that its ETC designation would give the incumbent LEC the incentive to improve its network? As comments being filed

⁴⁹ WWC Petition for Designation, p. 26.

⁵⁰ Id.

⁵¹ Id. at pp. 3, 26, and Appendix A attached to Petition.

directly by GWTC in this matter will show -- cutting back on the already capped universal service funding available to rural telephone companies by designating additional ETCs in high-cost rural areas like the Pine Ridge Reservation would, instead, have the opposite affect -- less investment in new facilities and equipment.

The Commission in its recent decision designating WWC as an ETC for certain service areas in the State of Wyoming, In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, CC Docket No. 96-45, DA 0-2896, released December 26, 2000, insisted that there be "empirical evidence on the record to support the contention that the designation of Western Wireless as an ETC . . . will harm consumers." No less of a standard should be applied when it comes to claiming consumer benefits. WWC should be required to establish its claims by presenting more detailed information and actual supporting evidence.

It appears, from the lack of information accompanying WWC's petition for designation that the company feels it can simply rely on ETC designations it has received in other state proceedings and before this Commission. Or, that it is sufficient to simply claim that its designation is consistent with the pro-competitive objectives of the 1996 Telecommunications Act.

WWC cites to the Commission's decision in Wyoming as support for a determination that its requested designation in this case would be in the public interest. With respect to that decision, SDITC believes it short-changes the public interest standard established in the federal law. To date, the Commission in its decisions has been too willing to make the assumption that competition will always benefit consumers and based on this assumption has further taken the view that the ETC designation provisions and federal universal service support mechanisms should be used as a means of facilitating competitive entry. This notion that the competitive

provision of telecommunications services is always desirable is simply inconsistent, in many cases, with the small scale of many rural communities.⁵² As earlier mentioned, the public interest requirement applicable in rural service areas is based on the recognition by Congress that there are certain areas (where the costs of service are high and customers are few) that may not be capable of sustaining multiple providers. Congress understood that competition for telecommunications services in certain areas, rather than benefiting consumers, could have the opposite effect and it was this concern that led to the adoption of the “public interest” language. Amendment 1259 to Senate Bill 652 (the 1996 Telecommunications Act) changed the language of Section 214(e) to specifically state that state commissions “shall” make a public interest finding before granting any additional ETC designations in rural service areas. In speaking specifically to the amendment, U.S. Senator Dorgan made the following comment:

. . . the protection of universal service is the most important provision in this legislation. S.652 contains provisions that make it clear that universal service must be maintained and that citizens in rural areas deserve the same benefits and access to high quality telecommunications services as everyone else. This legislation also contains provisions that will ensure that competition in rural areas will be deployed carefully and thoughtfully, ensuring that competition benefits consumers rather than hurts them. Under this legislation, the State will retain the authority to control the introduction of competition in rural areas and, with the FCC, retain the responsibility to ensure that competition is promoted in a manner that will advance the availability of high quality telecommunications services in rural areas.

The above statement by Senator Dorgan, who introduced Amendment 1259, leaves no doubt as to the intent of the public interest standard established in Section 214(e). That standard requires this Commission to primarily consider what impact any additional ETC designation in rural areas would have on preserving and advancing universal service.

The Commission in SDITC’s view has been too quick to assume that competition will benefit all areas, and in setting up the federal universal service mechanisms as a means to facilitate

⁵² See “Appendix C” attached to these comments, The Cost of Competition, Paper 3 of the NTCA 21st Century White Paper Series, December 2000.

or subsidize competitive entry into rural areas has taken a position that is inconsistent with the real intent of the public interest standard. The standard was included specifically to ensure that any multiple ETC designations in rural service areas would be consistent with universal service principles stated Section 254 of the Act. It is wrong to exaggerate the pro-competitive goals of the Act over the equally important universal service goals. Competition is not the only factor, nor the primary factor to consider in determining the public interest under the provisions of Section 214(e). If this were intended by Congress, there would have been no need for the public interest provision in the Federal Act because all competitive LECs, in competing with the incumbent carriers, would automatically qualify. Showing that an ETC designation will bring competition to a rural service area, is obviously not, by itself, enough to satisfy the public interest standard. The provisions of Section 214(e) require a much deeper analysis – one that is primarily focused on achieving a result that will, in fact, preserve and advance universal service in the affected rural area(s).

It is a reality that competition in rural service areas has the potential to adversely impact the affordability and quality of service to many customers. Today there are limited federal universal service funds available to ensure continued high quality, affordable telecommunications services in rural, high-cost areas. To designate any competitive carrier as eligible to receive universal service support in such areas will only increase universal service costs, either by duplicating payments to multiple carriers, or by diluting the amount of universal service support available to the incumbent carrier which will require a shift of overall system costs to customers remaining with the incumbent carrier. This shift in costs to a smaller customers base will result in higher per customer costs and rates and even greater need for universal service funding. The Commission should be especially concerned in this case as to what impact the designation of WWC would have on the ability of the incumbent carriers to continue their efforts in making

advanced telecommunications services, including services such as DSL, available on the Reservation. The Commission must recognize that a material reduction in the number of subscribers, and hence, the revenues of the affected incumbent carriers would not create corresponding reductions in their investment or expenses. If an additional ETC is designated, not only would it be extremely difficult to continue plans for the introduction of advanced services, but also continuation of the existing level of basic service would be difficult.

WWC sees the ETC designation process as a process to be utilized to foster competition in rural areas. SDITC strongly disagrees with this view of the federal ETC provisions. As Commissioner Harold Furchgott-Roth has stated:

Universal service programs were not created to bring competition to rural America. They were designed rather to increase the mere likelihood of telecommunications service in rural America particularly by reducing financial uncertainty. They were designed for areas of the country in which the cost of service was likely to be above the willingness of most people to pay, in essence, universal service was designed to subsidize one service provider where otherwise none might exist.

. . . The language of Section 254, however, is also not about bringing competition to rural America. Section 254 is about making sure that rural America is not left behind. Universal service support may not go to anyone, but only to eligible telecommunications carriers as designated by the states. States are never under any obligation to designate more than two eligible telecommunications carriers, and in areas served by rural carriers are not even obligated to designate more than one carrier.

Bringing competition in telecommunications services to rural America is a noble goal, and one I fully support. It is not, however, the statutory obligation of the Commission under Section 254 . . .⁵³

Neither Sections 254 nor 214(e) of the Federal Act should be interpreted as a means of subsidizing competitive entry into rural areas that may not at this time efficiently support more than one provider of telephone services. The entry of other providers should be in response to economic realities in the marketplace and not based on federal universal service subsidies.

⁵³ OPASTC) Advocate, December 1998/January 1999.

WWC's petition relies too heavily on the assumption that competition always translates to consumer benefits and does not include enough information to reliably determine that its designation as an additional ETC would be in the public interest. Until the Commission is presented with sufficient evidence to make an affirmative determination that rural area customers would not be harmed by the designation of WWC as an ETC, SDITC urges the Commission to conclude that the additional designation is not in the public interest.

F. The Commission's Twelfth Report and Order, FCC 00-208, contemplates a bifurcated process in addressing the WWC petition for designation.

SDITC questions why this case has not been bifurcated to allow for a separate initial proceeding on the issue of whether this Commission has jurisdiction to properly address the petition for designation under Section 214(e)(6) of the Act.

As pointed out earlier in these comments, the Commission in its Twelfth Report and Order established two different sets of procedures for handling requests for designation received under Section 214(e)(6) -- one procedure intended to address petitions from carriers serving non-tribal lands and another for carriers serving tribal lands. Each of these procedures is structured to allow for a separate Commission determination on the threshold question of whether the Commission or the state has jurisdiction to make the ETC designation. With respect to "carriers serving tribal lands" specifically, the process as described requires the petitioning party to describe in its petition "the basis for its assertion that it is not subject to the state commission's jurisdiction . . .".⁵⁴ The petitioner is then instructed to provide copies of the petition to the appropriate state commission and it is indicated that the Commission will release, and publish in the Federal Register, a public notice establishing a pleading cycle for comments on the petition.⁵⁵ The Twelfth Report and

⁵⁴ Twelfth Report and Order, FCC 00-208, at ¶ 120.

⁵⁵ Id.

Order then goes on to state that “[b]ased on the evidence presented in the record, the Commission shall make a determination as to whether the carrier has sufficiently demonstrated that it is not subject to the state commission’s jurisdiction. And that, [i]n the event the Commission determines that the state commission lacks jurisdiction to make the designation and the petition is properly before the Commission under Section 214(e)(6), the Commission will decide the merits of the request within six months of release of an order resolving the jurisdictional issue.”⁵⁶ *Emphasis added.* If the carrier fails to meet its burden of proof that it is not subject to the state commission’s jurisdiction, it is indicated that “the Commission will dismiss the request and direct the carrier to seek designation from the appropriate state commission.” In such cases, the Order specifically urges state commissions to act within a similar time frame (i.e., six months) to resolve the ETC designation request.⁵⁷

As described by the Commission, the process under Section 214(e)(6) (as applied to carriers serving tribal lands) contemplates the release of a separate FCC order on the threshold jurisdictional issue and then a subsequent process taking no longer than six months on the merits of the request for ETC designation. The jurisdictional issue is specifically described as involving a “threshold” determination, and is further described as being a “particularized” and “complicated” inquiry, involving an “intensely fact-specific legal inquiry informed by principles of tribal sovereignty and requiring the interpretation of treaties, and federal Indian law and state law.” The Commission’s Further Notice of Proposed Rulemaking (“FNPR”) issued in conjunction with its Twelfth Report and Order is also pertinent. In the FNPR, the Commission first requested comment on whether it should adopt a rule that would require the resolution of the merits of any request for designation under Section 214(e) within a six-month period, or some shorter time

⁵⁶ Id. at ¶ 121.

⁵⁷ Id.

period.⁵⁸ As a second and separate issue, comment was requested on the issue of whether the Commission should “require a similar time limit for the resolution of the jurisdictional issues associated with requests for eligibility designations on tribal lands, and what that time limit should be.”⁵⁹

Given all of the above referenced statements, the jurisdictional issue raised by WWC’s petition should have been addressed under a separate notice and outside of the six-month timeline that has been proposed by the FCC for its decision on the merits of ETC designation request. The Public Notice issued in this case, however, combines all of the issues (including the jurisdictional issue and all issues relating to the merits) into one comment process and requests all related comments, both initial and reply comments, over a period of only 45 days.

SDITC questions why the Commission has departed from its process as described in the Twelfth Report and Order and its FNPR and would object to the current process as not permitting adequate time to address the many issues involved. The Commission, itself, has described the jurisdictional issue as being very complex. In addition, the public interest issue applicable to this case requires an intensely factual and comprehensive review. Given the complexity of the issues presented and their importance to all parties involved, why is the process so confined? The limited 45-day process effectively precludes a full and fair hearing of all of the issues and in SDITC’s view gives rise to due process concerns.

SDITC requests that the Commission still consider bifurcating this matter so that it can separately address the jurisdictional issue. Then, ultimately, if the Commission finds it has jurisdiction to proceed on the merits of the ETC request, an additional opportunity for comment should be provided. In addition, if the Commission proceeds to the merits of the request, an actual

⁵⁸ FCC 00-208, ¶¶ 151-153.

⁵⁹ Id. at ¶ 152.

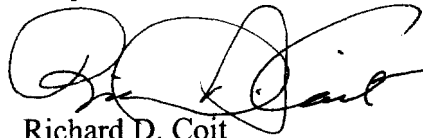
evidentiary hearing should be held to address the many factual issues relating to WWC's provision of the federally supported services and the required public interest determination.

IV. CONCLUSION.

Based on the foregoing argument and authorities, SDITC urges the Commission to immediately dismiss the WWC petition for designation as an ETC. The petition is not rightly before the Commission for any decision pursuant to 47 U.S.C. § 214(e) and WWC's claims that it is currently meeting the ETC service obligations and that its designation would be in the "public interest" are unsupported.

Dated this 9th day of March, 2001.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Richard D. Coit", written over a horizontal line.

Richard D. Coit
General Counsel for SDITC
(605) 224-0516

CERTIFICATE OF SERVICE

I hereby certify that an original and four (4) copies of the foregoing document were sent by Federal Express on the 9th day of March, 2001 to:

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street SW
Washington, DC 20554

Three copies were sent by First Class Mail via U.S. Postal Service to:

Sheryl Todd
Accounting Policy Division
Federal Communications Commission
445 Twelfth Street SW Room 5B540
Washington, DC 20554

An electronic disk copy was sent by First Class Mail via U.S. Postal Service to:

FCC Copy Contractor
International Transcription Service
445 Twelfth Street SW Room 5B540
Washington, DC 20554

One copy was sent by First Class Mail via U.S. Postal Service to the persons below:

The Honorable Susan Ness
Commissioner, FCC Joint Board Chair
Federal Communications Commission
445 12th Street SW, Room 8-B115H
Washington, DC 20554

The Honorable Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445 12th Street SW, Room 8-B115H
Washington, DC 20554

Gene DeJordy
Vice President Regulatory Affairs
Western Wireless Corporation
3650 – 131st Avenue SE, Suite 400
Bellevue, WA 98006

The Honorable Gloria Tristani
Commissioner
Federal Communications Commission
445 12th Street SW, Room 8-B115H
Washington, DC 20554

The Honorable Michael Powell
Commissioner
Federal Communications Commission
445 12th Street SW, Room 8-A204
Washington, DC 20554

Michele C. Farquhar
David L. Sieradzki
Ronnie London
Hogan & Hartson, LLP
555 Thirteenth Street NW
Washington, DC 20004-1109



Richard D. Coit, General Counsel
South Dakota Independent Telephone Coalition
320 East Capitol Avenue – PO Box 57
Pierre, South Dakota 57501-0057
Telephone (605) 224-7629

Members of the South Dakota Independent Telephone Coalition

Accent Communications, Inc.
Armour Telephone Company
Baltic Telecom Cooperative
Beresford Municipal Telephone Company
Bridgewater-Canistota Independent Tele.
Swiftel Communication (Brookings Municipal Telephone)
Cheyenne River Sioux Tribe Tele. Auth.
Dakota Community Telephone
East Plains Telecom. Inc.
Faith Municipal Telephone
Fort Randall Telephone Company
Golden West Telecommunications Coop. Inc.
Interstate Telecomm. Coop., Inc.
James Valley Telecommunications
Jefferson Telephone Company
Kadoka Telephone Company
Kennebec Telephone Company
McCook Cooperative Telephone Co.
Midstate Telephone Company
Mt. Rushmore Telephone Company
Roberts County Telephone Coop. Assn.
RC Communications, Inc.
Sanborn Telephone Cooperative
Sancom, Inc.
Sioux Valley Telephone Company
Splitrock Properties, Inc.
Splitrock Telecom. Cooperative, Inc.
Stockholm-Strandburg Telephone Co.
Sully Buttes Telephone Cooperative
Tri-County Mutual Telephone Company
Union Telephone Company
Valley Telecomm. Coop. Assn., Inc.
Vivian Telephone Company
West River Coop. Telephone Company
West River Telecomm. Cooperative
Western Telephone Company